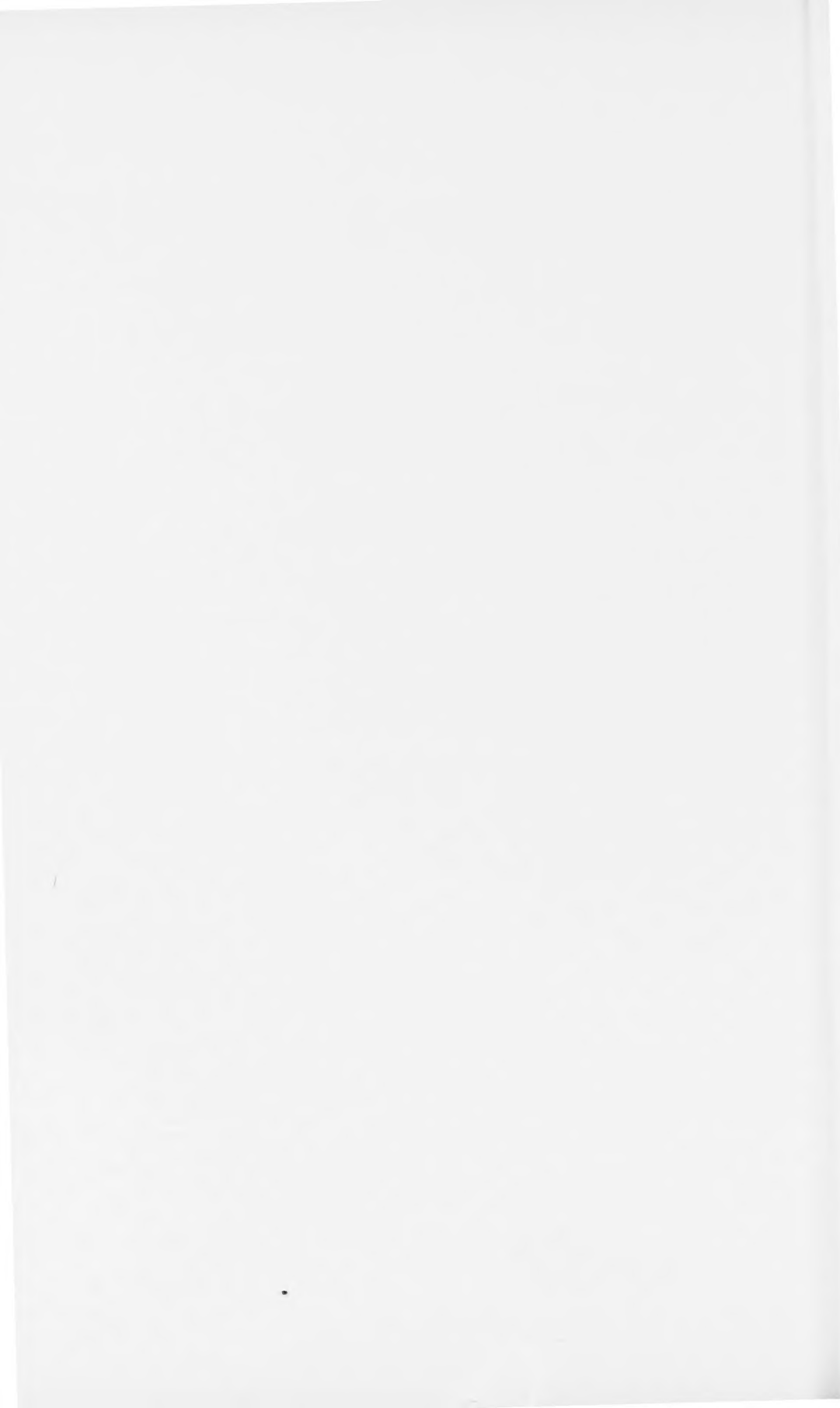


JOSEPH F. SPANIOL, JR.
CLERK

FIKRY KHALIL
2 SPRING STREET
JERSEY CITY, N.J. 07305
(201) 434-0811



QUESTIONS PRESENTED FOR REVIEW

1. Was plaintiff deprived of any property rights without due process in violation of the Fourteenth Amendment and 42 U.S.C. Section 1983?

2. Was plaintiff's Title VII action barred by the statute of limitations?

3. Was plaintiff subjected to discriminatory treatment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5?

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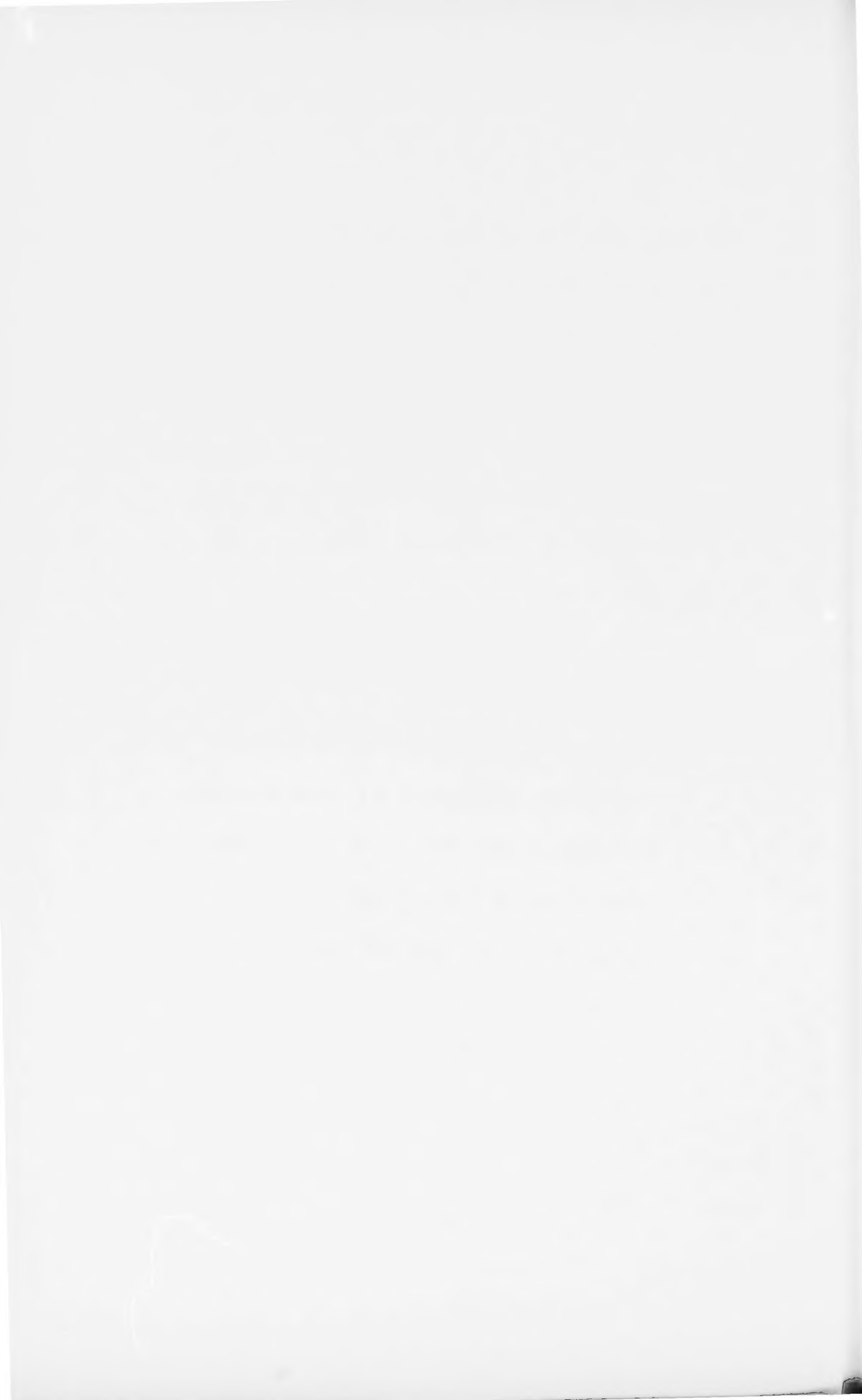


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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____ TERM, 19 _____

FIKRY KHALIL,

Appellant,

v.

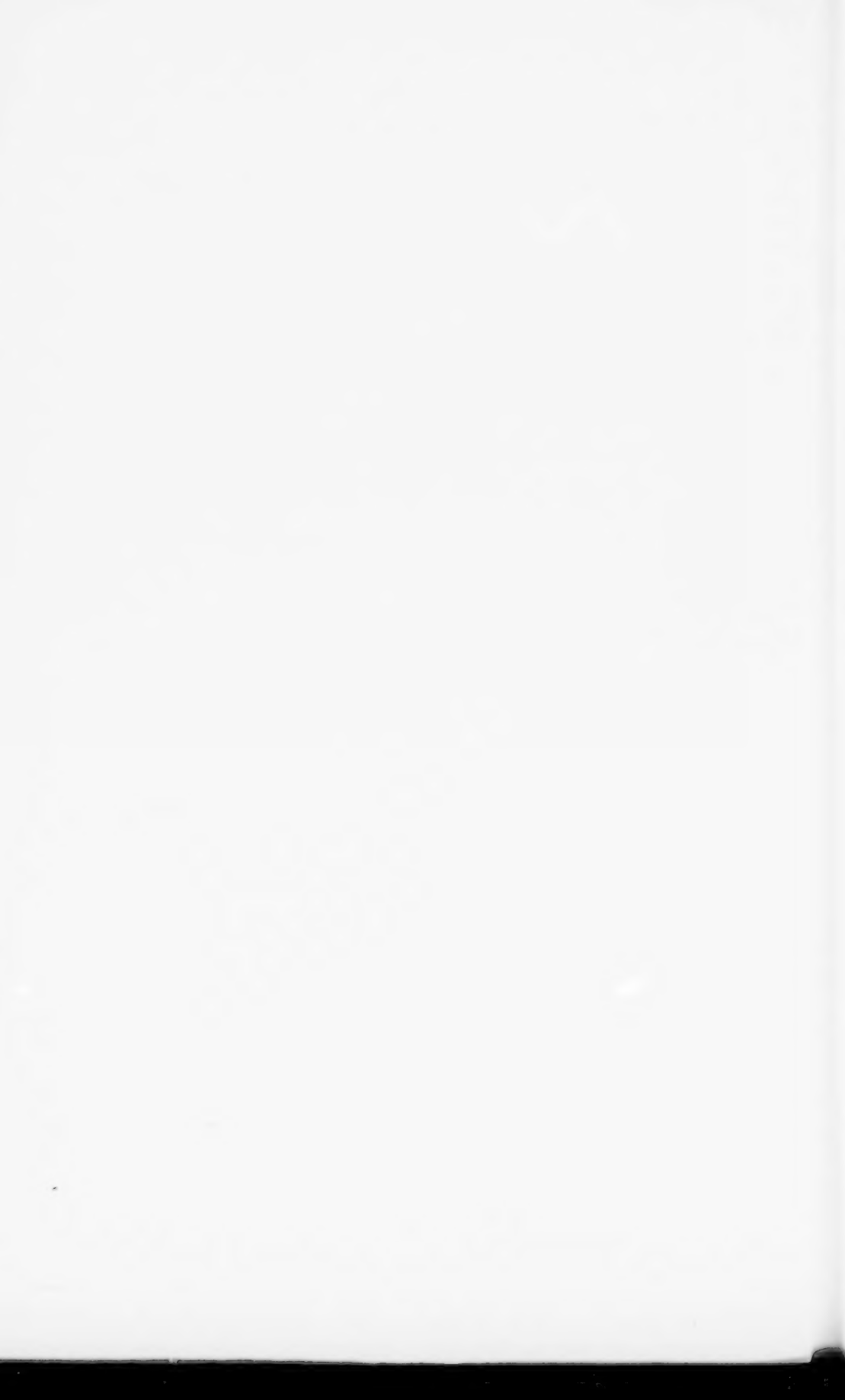
UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY-
NEW JERSEY MEDICAL SCHOOL,

Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

Prayer

Fetitioner Fikry Khalil respectfully
requests that a Writ of Certiorari issue to
review the judgment and order of the United
States Court of Appeals for the Third Circuit.



OPINIONS BELOW

The Opinions of the United States District Court for the District of New Jersey appear in Appendices A&B.

The Judgment of the United States Court of Appeals for the Third Circuit affirming without opinion the judgment of the United States District Court for the District of New Jersey appears in Appendix C . The Order of the United States Court of Appeals for the Third Circuit denying a Petition for Rehearing by the panel and the Court in banc appears in Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254. The Petition for Rehearing by the panel and the Court in banc was denied February 26, 1988. This Petition is filed within 90 days of that order.



CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

..... nor
shall any state deprive
any person of life,
liberty, or property,
without due process of
law; nor deny to any
person within its
jurisdiction the equal
protection of the laws.

Title VII of the Civil Rights Acts of
1964, 42 U.S.C. Section 2000e-2000e-17
(1976). Section 703 (a), 42 U.S.C.

Section 2000e-2(a) provides in pertinent
part:

It shall be unlawful employment practice for an employer-
(1) to fail or refuse to hire or
or to discharge any individual,
or otherwise to discriminate
against any individual with
respect to his compensation,
terms, conditions, or privileges
of employment, because of such
individual's race, color,
religion, sex, or national
origin.

STATEMENT OF THE CASE

In 1977, plaintiff was appointed as a tenured track Assistant Professor of Radiology at the University of Medicine and Dentistry of New Jersey ("UMDNJ") under a four year contract. In 1981, plaintiff was unanimously reappointed as a tenured track Assistant Professor of Radiology at UMDNJ for an additional three years. In June 22, 1983, plaintiff was notified by the Dean that his employment would terminate on June 30, 1984. In December 15 , 1983, plaintiff became totally disabled and this disability continued through June 30 , 1984.

In January, 1984, plaintiff submitted his credentials for consideration for promotion to Associate Professor with tenure. In March 22, 1984, plaintiff was informed that the Faculty Committee on Appointments and Promotions

("the FCAP") did not recommend him for promotion. In June 22, 1984, plaintiff was notified by the Board of Trustees that his employment would terminate on June 30 1984.

In January 4, 1985, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that the University's failure to promote him was due to his Egyptian national origin. In March 20, 1985, plaintiff filed a complaint with the New Jersey Division of Civil Rights alleging discrimination based on national origin. In January 17, 1986, the EEOC issued plaintiff a Notice of Right to Sue, plaintiff then filed this action on March 25, 1986 alleging a violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Section 2000e-5. In November 30, 1986, plaintiff was



permitted to ammend his complaint to allege additional claim under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and under 42 Section 1983.

In April 13, 1987, the United States District Court for the District of New Jersey granted defendant 's motion for summary judgment and dismissed that portion of my complaint which dealt with my due process rights. In May 26, 1987, the District Court dismissed my Title VII claim as being barred by the statute of limitations.

Plaintiff appealed from both orders to the United States Court of Appeals for the Third Circuit and his appeals were consolidated on July 23, 1987. Plaintiff included in his appeals newly discovered evidence. These documents have not been presented to the District Court because they, by due diligence , were not available to plaintiff at the time the

case was in the District Court, or in time to move for a new trial under Rule 59(b).

In September 2, 1987 , appellee moved to suppress portions of plaintiff's appendix and for leave to file supplemental appendix.

In February 2, 1988, the United States Court of Appeals for the Third Circuit ordered that appellee's motion to suppress portions of the appendix is GRANTED and that the judgment of the District Court be and is hereby AFFIRMED. Costs taxed against appellant. Appellant filed a petition for rehearing by the panel and the Court in banc. This petition was denied on February 26, 1988.

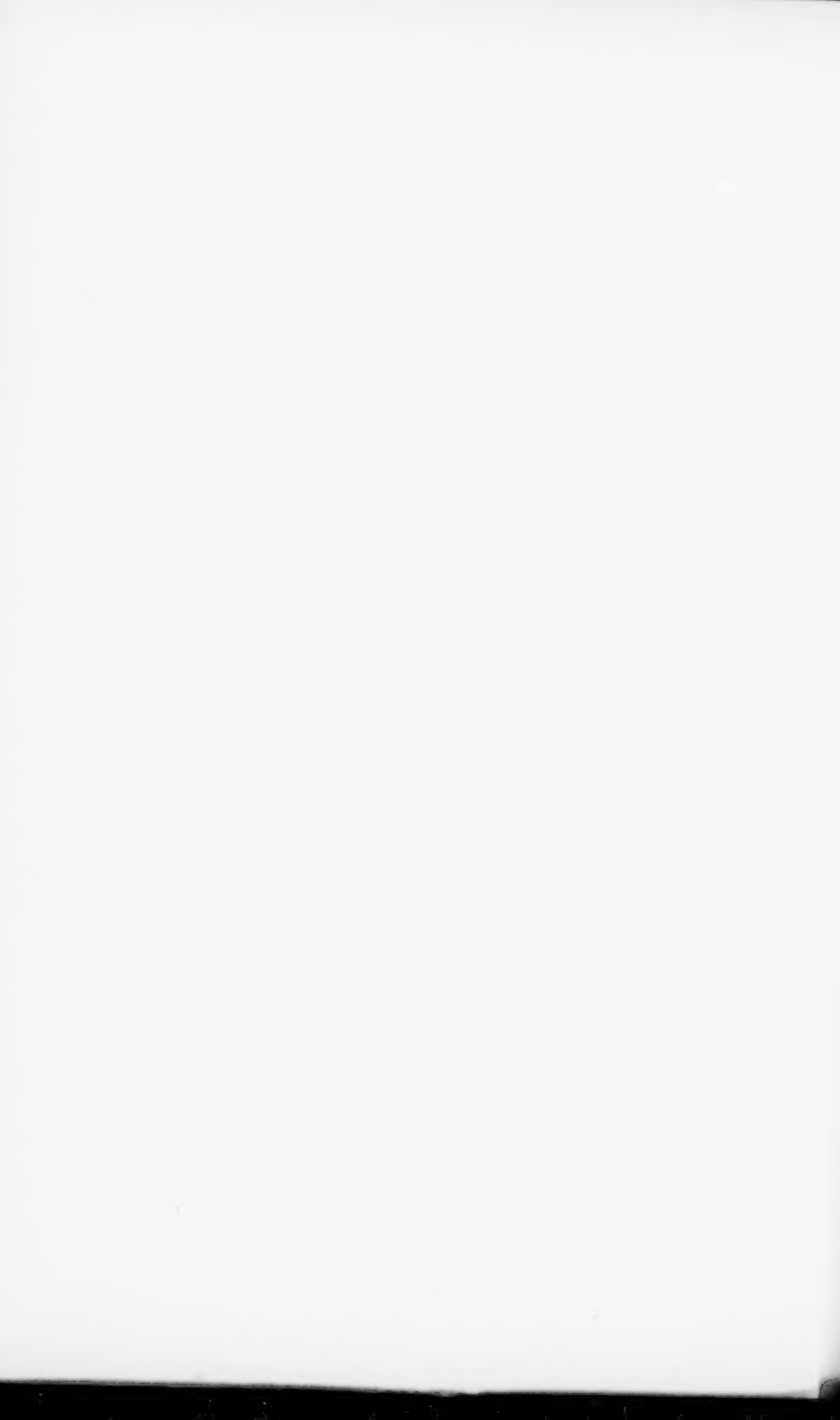


REASONS FOR GRANTING THE WRIT

POINT I

APPELEE'S MOTION TO SUPPRESS PORTION OF
APPENDIX SHOULD NOT BE GRANTED

In representing myself, I submitted newly discovered documents to the United States Court of Appeals for the Third Circuit, to give the Court the opportunity to review all of the pertinent evidence with respect to the issues. These documents have not been presented to the District Court because they, by due diligence, were not available to me at the time the case was in the District Court, or in time to move for a new trial under Rule 59(b). The reason for that is that my chairman left UMDNJ and moved to Morristown Memorial Hospital and needed a long time to go back to UMDNJ and to review his record there and to write his recollection.



tions about his conversations with me. These documents are extremely relevant to the issues which I have raised in my complaint and amended complaint. I believe that these documents firmly support my position that a discriminatory action was undertaken by UMDNJ in my case.

Defendant moved to suppress these documents stating that since the District Court did not see these documents, they should not be considered by the United States Court of Appeals for the Third Circuit. The United States Court of Appeals for the Third Circuit granted- without opinion- the defendant's motion to suppress these documents. As a layman , I do not quite understand this objection, since I believe that the United States Court of Appeals for the Third Circuit should consider all of the relevant evidence in making its

determination. However, if it is important that the District Court consider these documents in connection with its decision, I would respectfully submit that this Court send my cases back to the District Court for its reconsideration of my complaint in light of this evidence.

POINT II

UMDNJ VIOLATED MY CONSTITUTIONAL PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

I respectfully submit to this Court some of the newly discovered documents which I referred to in point I, namely : an actual draft of a letter prepared by my departmental chairman , the notes inscribed thereon by the Dean , and the ultimate final draft of the letter written by the chairman. All of these documents have been presented to

the United States Court of Appeals for the Third Circuit. As can be seen from the initial draft prepared by my chairman , he would have stated:

Dr. Khalil's potential would best be served by a short(one or two year) extension of his present rank to allow fruition of grant requests now in submission and further development of his present research activities. We are prevented from doing this by the rules under which we all function.

As can be noted from the draft , the Dean crossed out the foregoing language of my chairman and suggested in its place the following language:

I agree with the tenured faculty that Dr. Khalil has thus far shown no significant independent investigative activity.

The question of whether this suggested change came from the Dean is answered by the additional notation that the Dean's memo should be " well hidden " which of course, raises the additional inference that discriminatory remarks prompted

this concern for secrecy. Incredibly enough , the final version of the letter written by my chairman contains the exact language of the Dean including the underscoring of the word independant. Primarily , as a result of the foregoing correspondence and memoranda , I was advised on March 22, 1984 that FCAP did not recommend me for promotion. In fact, when one reviews the correspondence edited by the Dean , it becomes apparent that under appropriate circumstances, I may have received that recommendation but for the discriminatory acts of UMDNJ.

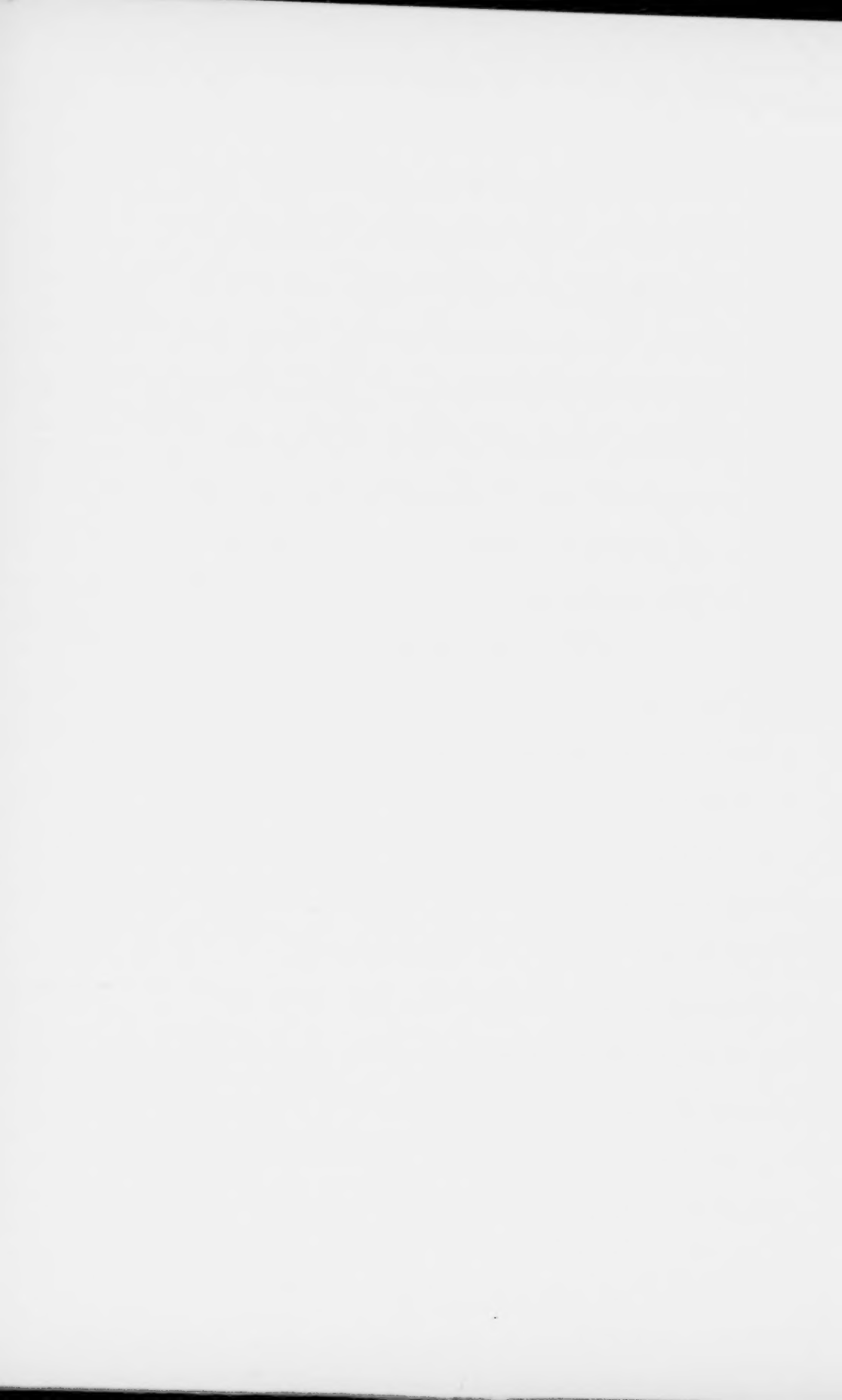
The significance of the foregoing documents is self-evident.

Obviously, my chairman was of the opinion that I possessed the requisite capabilities that given a short extension, I would have achieved tenured faculty status. The chairman stated to me in a letter which was submitted to the United States Court of Appeals for the Third



Circuit that he believed that my activated grant and the success of my research would ultimately yield his support for my promotion to the tenured rank of Associate Professor, This sentiment was echoed as recently as July 30, 1987 when the chairman wrote to me about my continual request for consideration for promotion.

The real question here is whether I was discriminated against in my pursuit of a tenured track position . I respectfully submit that I have been. Certainly, I should have at least been given the opportunity to explore by way of discovery what my departmental chairman meant by his initial efforts in my behalf with respect to the FCAP application. More importantly , what was the basis for the Dean's editing of that recommendation ? Given the fact that I



was obviously pursuing a successful track towards a tenured position , and further that since being denied this position that UMDNJ has seen fit to retain me as a member of the faculty so that I can pursue my research under the National Institute of Health grant , the question is not whether I had a constitutional right to an additional six month period- as addressed by the District Court- but rather the question is wether my race and/or physical incapacity constituted the basis for what appears to be a patently arbitrary decision.

More to the point is the decision of the Court in Cohen vs. Board of Trustees , Docket No. 85-3841 (D.N.J. June 27,1986). As in Cohen , it was made clear to me by my departmental chairman , and it would have been made clear if his written recommendation had

not been edited , that I would have been successful in my efforts to achieve tenured status had I been given additional time within which to demonstrate my research skills and my published reports.

Put another way , all of the evidence with respect to my career at UMDNJ pointed towards a tenured position and other than the conclusory and factually unsupported remarks of the Dean , there is no credible evidence to the contrary. Under these circumstances, it is clear that the decision of UMDNJ was arbitrary , capricious and based upon discriminatory grounds . This is particularly so when additional time could readily been granted by permitting me to go into adjunct status during the seven year probationary term as is set forth in Ms. Davenport's memo. Thus, having been denied an opportunity to



obtain tenured status , I would submit that I have been constitutionally deprived of my rights of procedural and substantive due process.

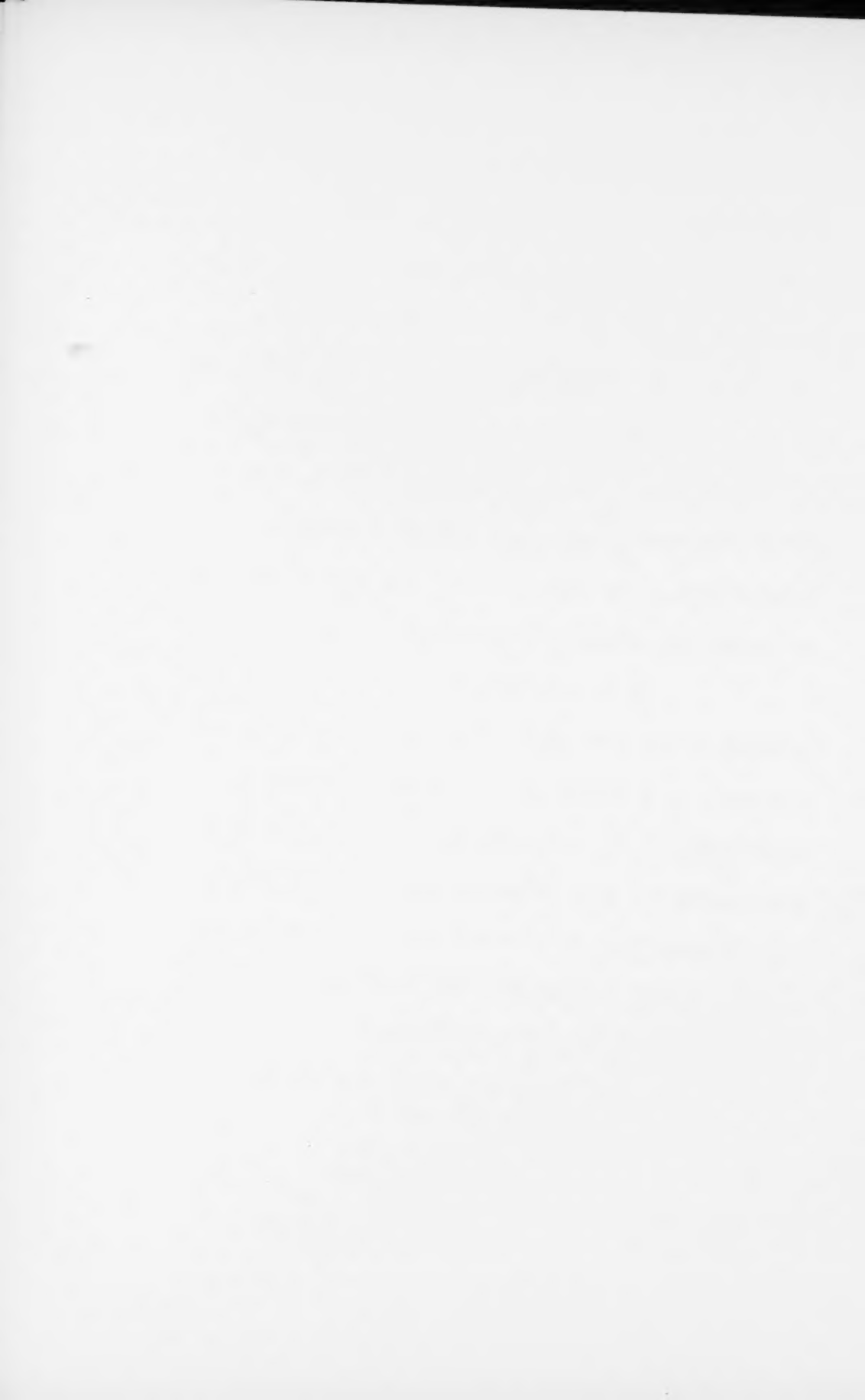
I have also been constitutionally deprived of my rights of procedural and substantive due process when the Dean in 1985- when I was an adjunct Assistant Professor- refused to transmit my credentials to FCAP for consideration for promotion. The District Court noted that while in three other instances such credentials had been transmitted by the Dean to FCAP , those three individuals while serving in an adjunct capacity had received the recommendation of their departmental chairman. It is important to note however that the recommendation of the departmental chairman is not a prerequisite for reconsideration . I point to the testimony which took place

in my arbitration proceeding wherein the Dean admitted that such a recommendation was not required. Thus , the assertion that I lacked the recommendation of my departmental chairman is nothing more than a straw man created by UMDNJ since such a recommendation is not required.

In addition, the District Court, in reaching its decision in the April 13 , 1987 opinion, relied upon the case of Board of Regents vs. Roth , 408 U.S. at 578. I would submit that the application of Roth to the foregoing fact facts of my case is inappropriate. Roth was hired for one year and one year only. The fact that he was not rehired or reappointed therefore has no bearing whatsoever on the facts of my case. In my case, I was hired initially for a four year period and then reappointed to a three year term. In the whole seven year

period, I was not a tenured faculty member by virtue of the contract. However I was on a tenured track position pointing towards tenured status. The entire seven year process was designed to put me in a position of being promoted to a tenured position. This was not a one year contract without reappointment. Therefore , to apply Roth to the facts of my case is simply inappropriate.

I therefore respectfully submit that for all of the foregoing reasons , I have been constitutionally deprived of my rights of procedural and substantive due process and the District Court committed an error in dismissing my case. Also , The United States Court of Appeals for the Third Circuit committed an error in affirming the District Court's judgment.



POINT III

THE COMPLAINT UNDER TITLE VII IS NOT
BARRED BY THE STATUTE OF LIMITATIONS.

In June 22, 1983 , I received
the following letter from the Dean :

June 22, 1983

Dear Dr. Khalil

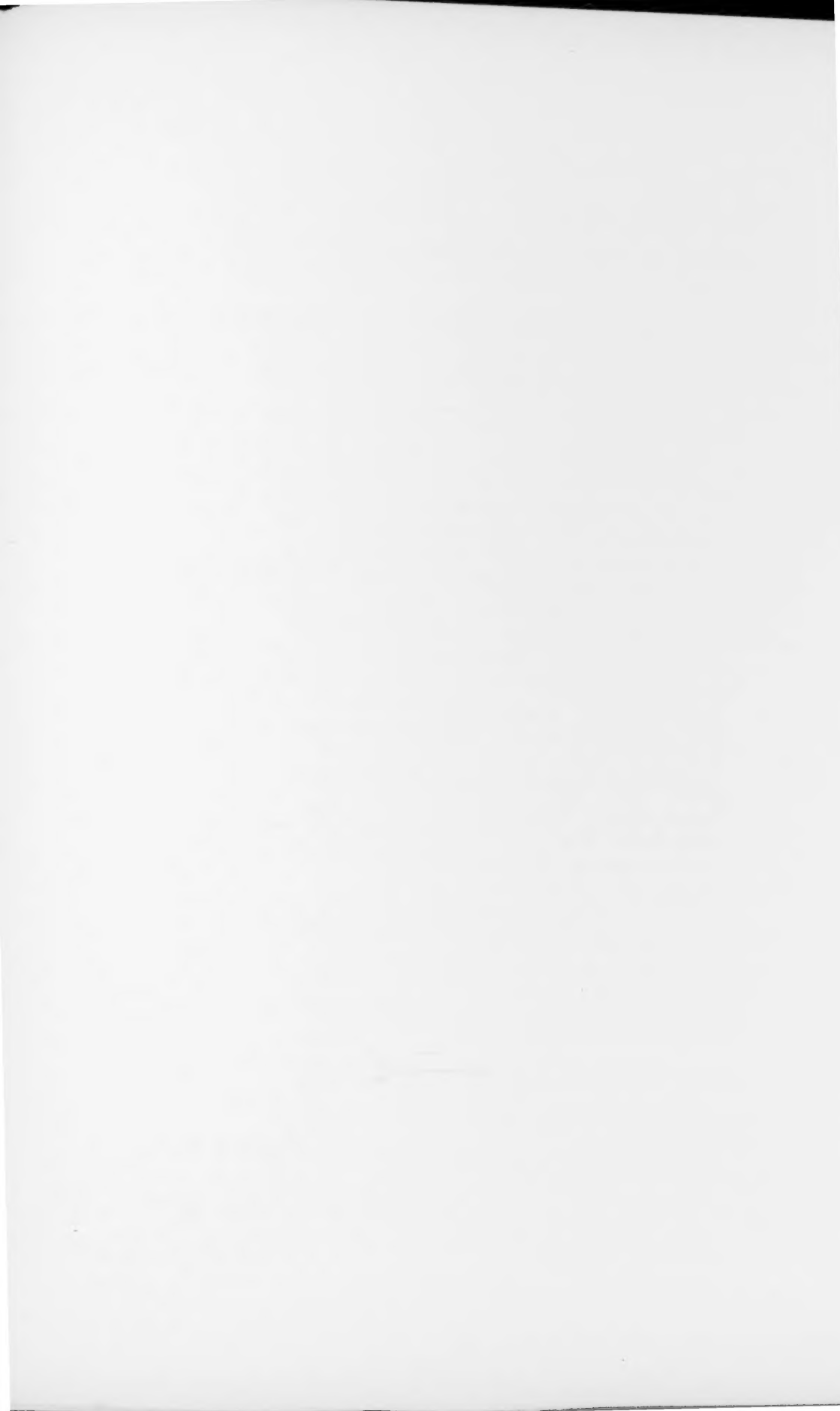
Your appointment as Assistant Professor in the Department of Radiology at the University of Medicine and Dentistry of New Jersey New Jersey Medical School expires on June 30, 1984. I have received notification from your departmental chairman that he is not recommending renewal of your appointment. In accordance with the Bylaws of the University, I am officially informing you that your appointment as Assistant Professor will not be renewed and your employment at the University will terminate effective June 30, 1984.

Thank you for your contributions to the New Jersey Medical School, and I wish you well in your future endeavors.

Sincerely

Vincent P. Lanzoni, M.D., Ph.D

This letter only informed me that my
appointment as an ASSISTANT PROFESSOR will
not be renewed , it DID NOT preclude that



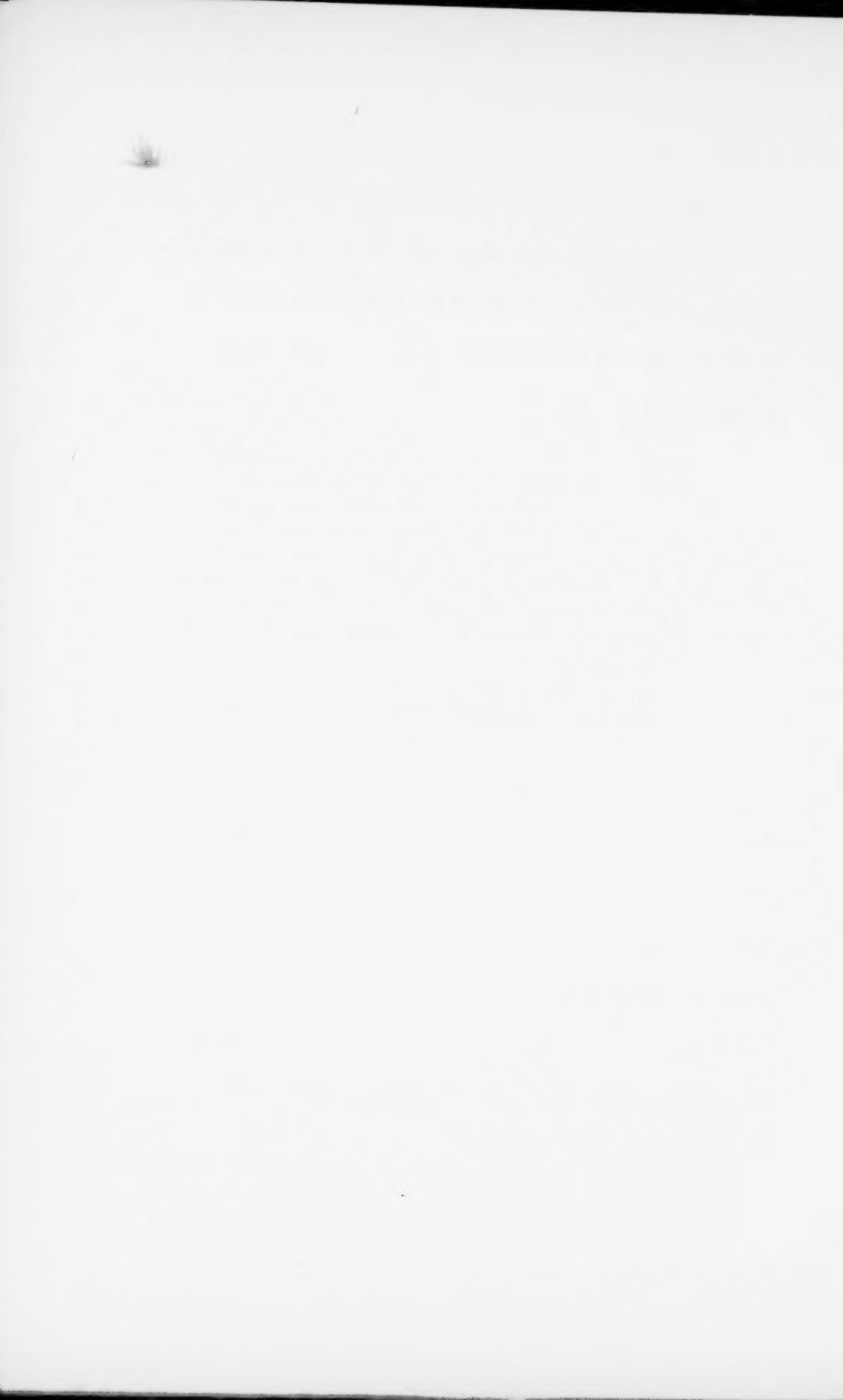
I can submit my name for promotion to the tenured rank of Associate Professor as outlined in item II Section G of the Guidelines and procedures for appointment or promotion to the UMDNJ-New Jersey Medical School Faculty:

If a faculty member has not been recommended for promotion within the times stated in the table below, his/her name may be submitted at his/her request, by the department chairperson to the Dean for review in accordance with normal procedures as outlined in Item II , Section A above.

Instructor	3 years
Assistant Professor	6 years
Associate Professor	7 years

In addition, the Dean's letter of June 22, 1983 DID NOT communicate any tenure decision to me. THE FIRST TIME a tenure decision was communicated to me was in MARCH 22 ,1984 when the FCAP informed me that they did not recommend my promotion to the tenured rank of Associate Professor.

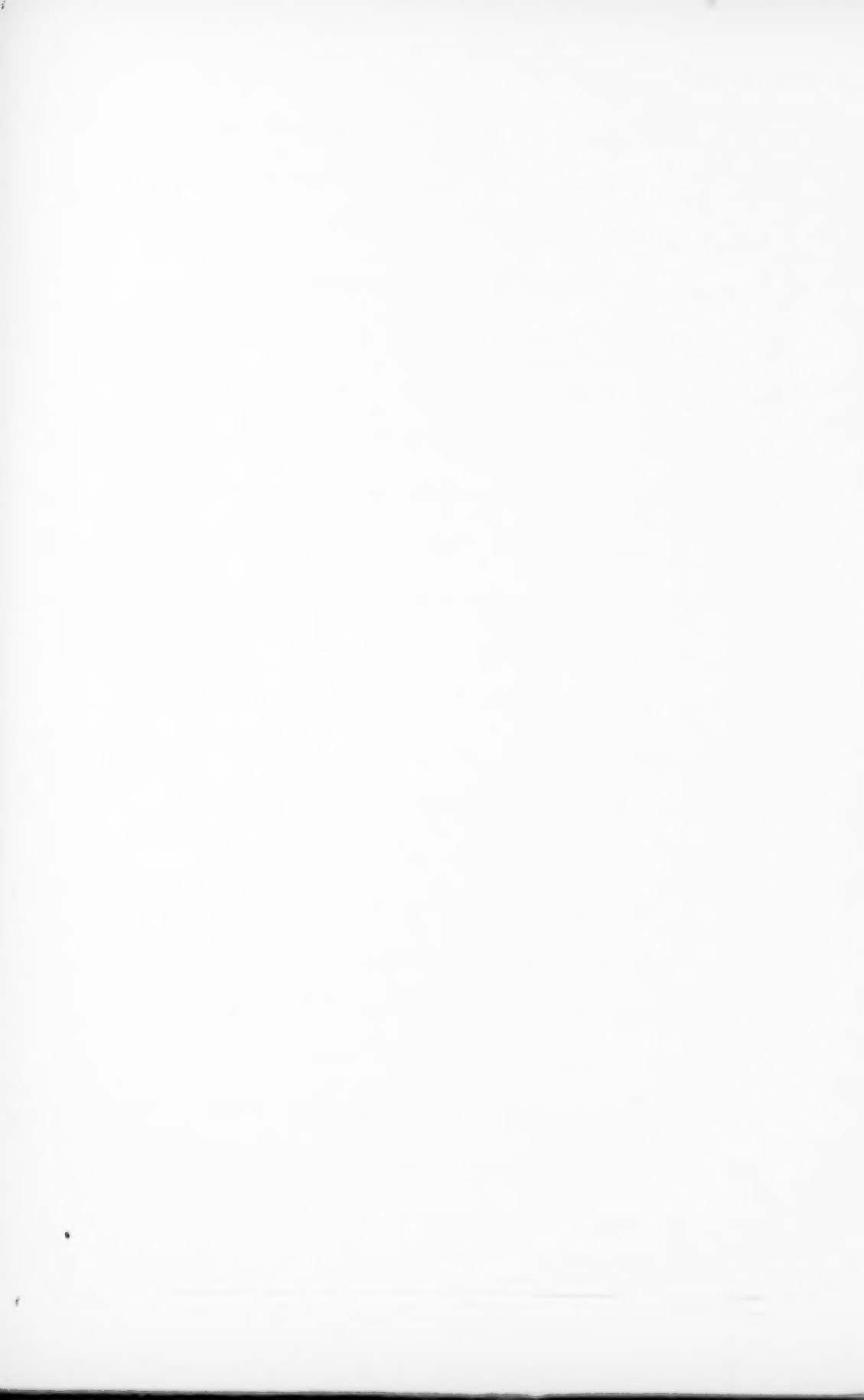
In the May 26 ,1987 Opinion, the District Court ruled that the statute



of limitations, in my case , began to run from June 22 ,1983 , the date of the letter of the Dean.

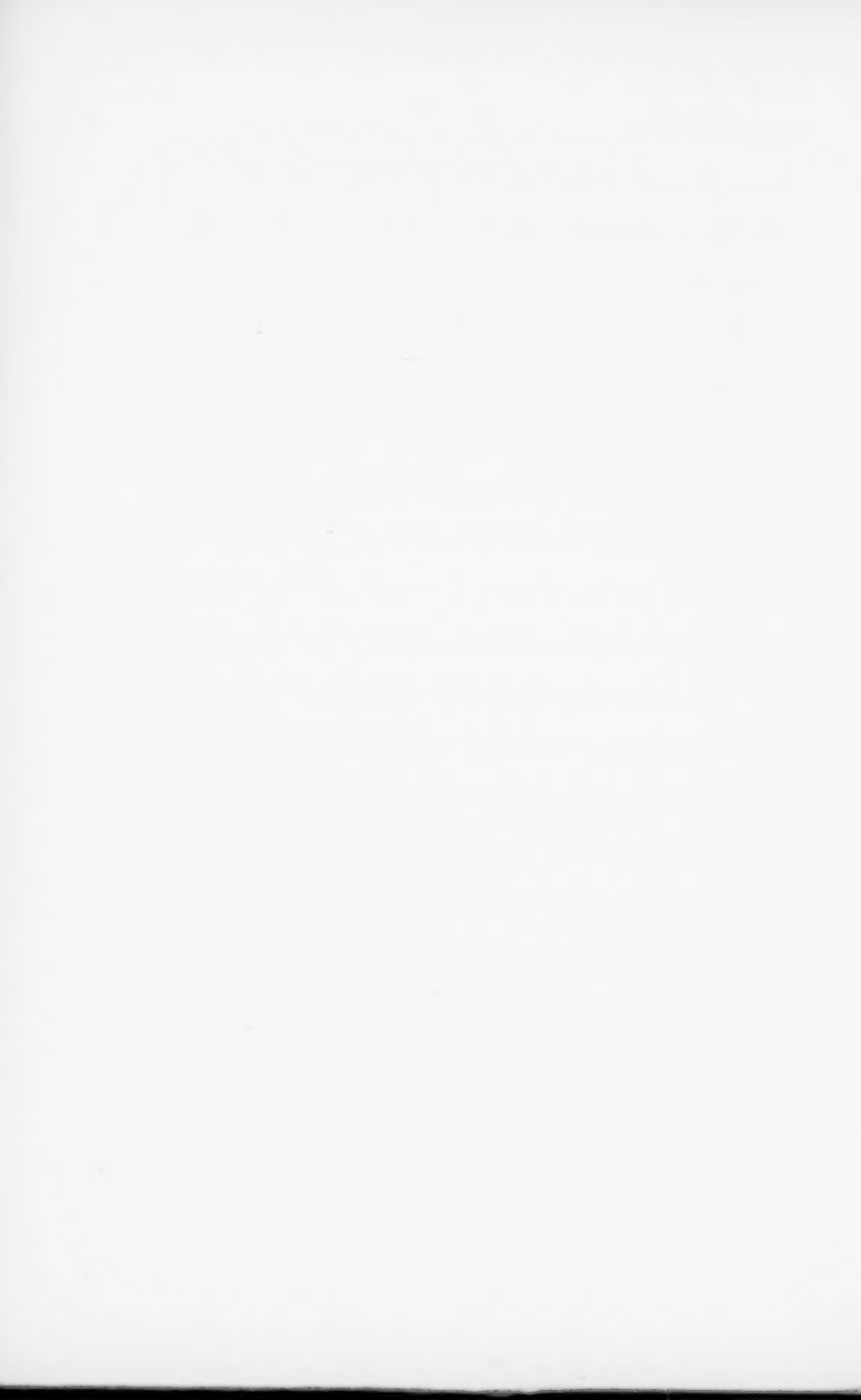
The District Court cited the case of Delaware State College vs. Ricks, 449 U.S. 250 (1980) for the proposition that my pursuing of several remedies-such as submitting my credentials for consideration for promotion- did not toll the running of the statute of limitations. I would respectfully submit that this must be a misapplication of that decision to me. Certainly , no prejudice has befallen UMDNJ as a result of my timely efforts to pursue my rights.

More to the point and this is the second issue which I believe demonstrates the incorrectness of the District Court's decision , UNLIKE the employee in Ricks, the June 22, 1983 letter of the Dean DID NOT communicate a tenure decision to me , as was found by the District Court.



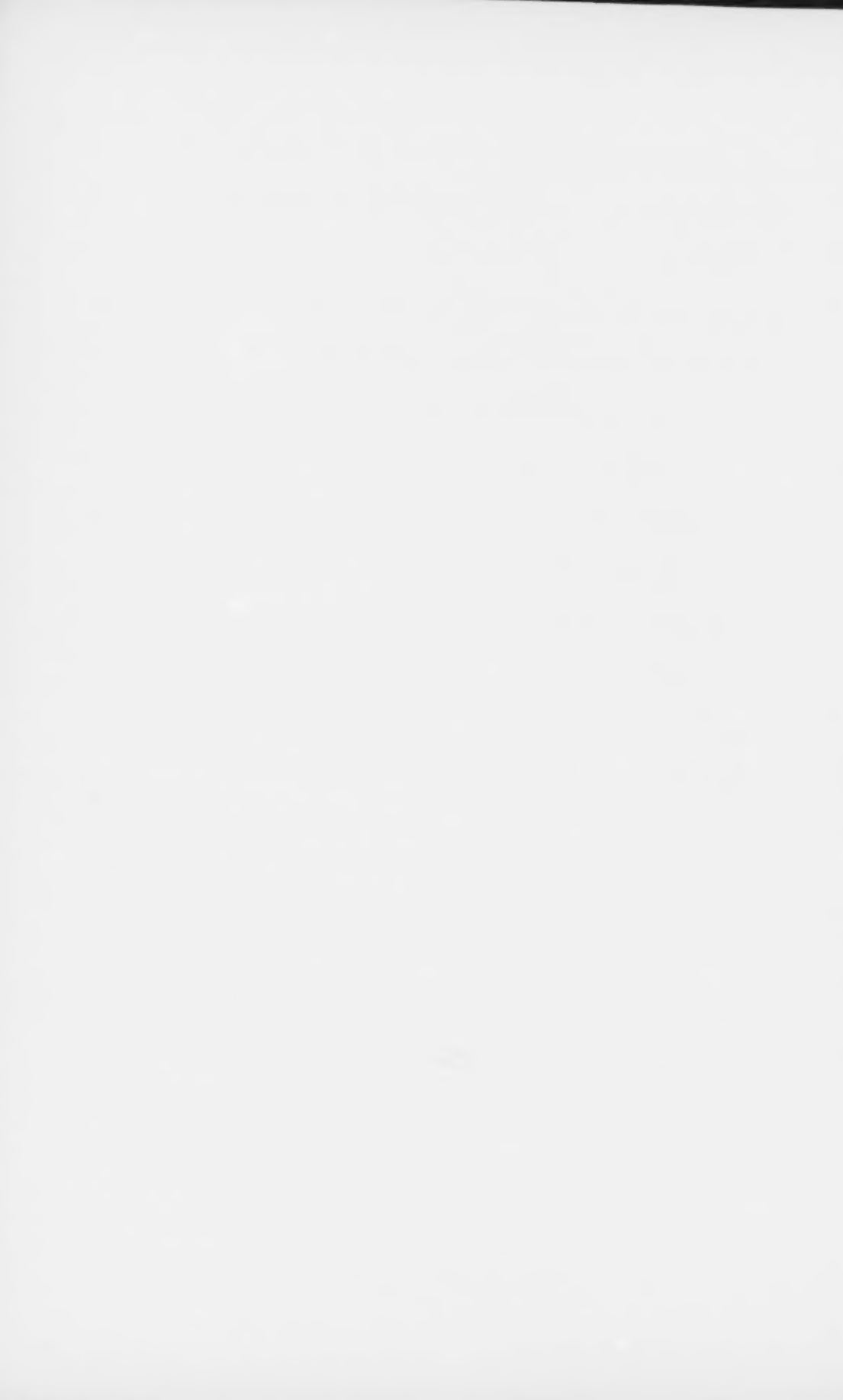
This holding by the District Court is predicated upon an erroneous view of UMDNJ's bylaws. As has been noted, once I received the letter from the Dean, I immediately submitted my own credentials to the FCAP for consideration for promotion to the tenured rank of Associate Professor. The FCAP constitutes an independent avenue toward a tenured status. Thus, while I could have achieved tenured status simply by virtue of action by my departmental chairman, the Dean, the FCAP and ultimately the Board of Trustees, a completely independent avenue which was available to me consisted of the FCAP. If in fact FCAP had approved my credentials and recommended promotion to an Associate Professor, this action would then have been taken to the Board of Trustees for an ultimate decision.

Thus, there were two procedural



courses available to me with respect to my promotion. Under these circumstances , to point to only one of these avenues being foreclosed and to utilize the date of the notice of that information as the basis for the commencement of the running of the statute of limitations must be incorrect. To rule otherwise would render empty my alternative avenue of pursuing my rights before the FCAP. Certainly , this was not the intent of the bylaws of UMDNJ and it was pursuant to these rights that I sought relief before the FCAP prior to filing my complaint.

I therefore respectfully submit that for all of the foregoing reasons , my complaint under Title VII should not be dismissed as being barred by the statute of limitations.



CONCLUSION

For the above-stated reasons , and on the basis of the authorities cited , this Court should reverse the actions of the District Court and the United States Court of Appeals for the Third Circuit , and render a decision in this case , or in the alternative, remand the case to the District Court with instructions to consider all of the newly discovered documents presented by the appellant. Appellant prays the Court will grant a writ of certiorari.